



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Acting Chairman Nancy Nord
 Commissioner Thomas H. Moore

ITEM:

Request from ATV Companies for Exclusion from Lead Content Limits under Section 101(b)(1) of the Consumer Product Safety Improvements Act ("CPSIA")
(Briefing package dated April 1, 2009, OS No. 5934)

DECISION:

The Commission voted unanimously (2-0) to accept staff's initial recommendation and deny ATV companies' request for exclusion and directed the staff to prepare a ballot vote and draft *Federal Register* document to stay enforcement that includes certain elements.

Acting Chairman Nord and Commissioner Moore each issued statements with their votes. Attached are the statements which include the directions to the staff.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson".

Todd A. Stevenson
Secretary

* Ballot vote due April 8, 2009



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

ADDITIONAL STATEMENT OF ACTING CHAIRMAN NANCY NORD
ON THE REQUEST FOR EXCLUSIONS FROM THE LEAD CONTENT LIMITS OF THE CONSUMER
PRODUCT SAFETY IMPROVEMENT ACT OF 2008
April 17, 2009

Two weeks ago I took the unusual step of directing compliance staff to exercise enforcement discretion by not enforcing Section 101 of the CPSIA with respect to youth motorized recreational vehicles because of my strong concern about the safety issues inherent in removing these products from the market. I also invited my colleague to join me in making this a unanimous decision by the Commission through a stay of enforcement. Since that time, the Commission and staff have been working to develop a limited stay of enforcement that addresses the competing and conflicting issues presented by the application of Section 101 of the CPSIA to the products before us in the exclusion petition. I particularly appreciate my colleague's contributions to this effort.

My colleague and I are in agreement that the law contains extremely restrictive language concerning an exclusion for these petitioners. I am very pleased we are jointly directing staff to prepare a ballot vote and draft Federal Register notice to stay enforcement for this category of products. I expect the Commission will vote its approval of it expeditiously. I hope that the state attorneys general will follow our lead in this matter.

**DIRECTION TO THE STAFF ON THE REQUEST FROM ATV COMPANIES
FOR EXCLUSION FROM LEAD CONTENT LIMITS UNDER SECTION 101(b)(1)
OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT (CPSIA)**

My colleague and I are directing staff to prepare by April 24 a ballot vote and draft Federal Register document to stay enforcement including the following elements:

- A. The stay shall apply to vehicles manufactured both before February 10, 2009 and to vehicles made on or after that date through the termination of the stay on May 1, 2011. The stay with regard to vehicles made during this time period shall remain in effect for the life of those vehicles.
- B. The stay shall apply to replacement parts for the vehicles described in the paragraph above, provided those parts do not have a higher lead content than the parts originally installed on the vehicle. The stay with regard to replacement parts shall remain in effect for the life of those parts.
- C. The stay in no way limits the Commission's ability to take action with regard to these vehicles for other safety-related issues including compliance with the American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration, and performance Requirements developed by the Specialty Vehicle Institute of American effective on April 13, 2009 and the requirement to comply in all respects with an action plan on file with the Commission as set forth in the CPSIA.
- D. Each manufacturer seeking the protection of the stay, shall submit a request to the agency within 45 days of this order identifying, with specificity, the vehicles affected, the parts or components of those vehicles that do not comply with the lead limit then applicable in the CPSIA, the material from which the parts or components are made, the lead content level (or a range, if the lead content varies) of those parts or components, and the reason such parts or components are not able to be made inaccessible, substituted with another material, or made with a complying level of lead at that point in time. If some vehicles have been modified to reduce the number of parts containing lead or to make certain parts inaccessible, the manufacturer's request for the protection of the stay should outline those changes in general terms and the dates such changes were made.
- E. Manufacturers seeking an extension of the stay shall, no later than six months prior to the expiration of the stay, provide a formal request to the Commission for an extension containing all of the information required in paragraph D above.
- F. Under either paragraph D or E above, the evidence presented by the manufacturer as to why such parts or components are not able to be made inaccessible, substituted with another material, or made with a

complying level of lead at that point in time, shall be limited to why it is technologically infeasible to bring such part or component into compliance with the CPSIA and the safety considerations that relate to that conclusion. The manufacturer shall also state, with regard to each part or component, when and how it expects that part or component will be brought into compliance with the CPSIA.

- G. As manufacturers bring their parts or components into compliance with the CPSIA they shall notify the Commission of that fact, state how compliance was achieved and identify the vehicles that are affected by the change in compliance status by date of production or other identifying characteristic.



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF ACTING CHAIRMAN NANCY NORD
ON THE REQUEST FOR EXCLUSIONS FROM THE LEAD CONTENT LIMITS OF THE CONSUMER
PRODUCT SAFETY IMPROVEMENT ACT OF 2008
April 3, 2009

In considering exclusions, consumer safety must direct the outcome of our deliberations. Therefore, it is with extreme reluctance that I am voting today to deny the petition, filed by companies and associations representing the ATV and motorized bike industries, for an exclusion from the lead content limits found in Section 101 of the Consumer Product Safety Improvements Act (CPSIA). I do this because the clear language of the law requires this result, not because it advances consumer safety. To the contrary, application of the lead content mandates of the CPSIA to the products made by the petitioners may have the perverse effect of actually endangering children by forcing youth-sized vehicles off the market and resulting in children riding the far more dangerous adult-sized ATV's.

For this reason, in my capacity as chairman, I am directing compliance staff to stay enforcement of Section 101 and related provisions of the CPSIA to this category of products for twelve months and hope my colleague, Commissioner Moore, will join me in making this a unanimous decision by the Commission. During this time-out, it is my hope that Congress will consider how the law needs to be fine-tuned to address this serious child safety dilemma. This enforcement hiatus will also give industry the opportunity to examine what reasonable changes can be made in their products to bring them closer to the requirements Congress set out in the CPSIA. Staff will meet with industry to do more testing to determine how their products can meet the 300 ppm threshold Congress set and determine what is possible. I will expect periodic status reports on progress to this plan.

It is clear that the law does not give the Commission the flexibility to grant an exclusion for petitioners' products. Congress wrote Section 101(b) in such a way as to leave little discretionary power with the agency to grant common sense exclusions. This lack of flexibility was brought to the attention of Congressional staff working on the legislation during the conference process and it was confirmed this is what was intended. As our career staff has discussed on many occasions and as we now have been formally advised by staff, we do not have the statutory authority to grant the exclusion requested in this case.

Even though the career staff of the agency has concluded that we cannot grant the exclusion, they have NOT concluded that petitioners products present a health risk to children because of exposure to lead. To the contrary, staff states "a bigger safety concern than lead exposure is that the elimination of youth ATV sales will most likely increase the number of adult ATV's purchased to be used by younger children; therefore increasing their risk of injury and death."

The issues presented to us in the petition are much more complex than just ordering petitioners to "get the lead out" of their products by a certain date. Petitioners have presented persuasive evidence that lead serves

a purpose in the structural integrity of the metals used in the products and that suitable substitutes are not available. They point out the impracticality of using virgin materials for these products, including issues dealing with the recycling of metals. They point out that the approach in the CPSIA is contrary to the approach taken in the rest of the world, e.g. the European Union which has looked at these issues rather extensively and made allowances. These are all issues that the Commission should have the authority to consider but under the rigid language of the CPSIA, we cannot.

The effect of denying the petition is to make Section 101(e) of the CPSIA, which limits the Commission's authority to stay enforcement during rulemaking, no longer applicable. Therefore, during the pendency of a stay of enforcement, ATV's and motorized bikes appropriately sized for children twelve and younger can again be available and the Commission will not seek penalties for violation of Section 101 and related provisions of the CPSIA against those who sell them. I hope that the state attorneys general will follow the lead of the agency on this matter.

All stakeholders—industry, users, Congress, and the Commission—need to come together to fix the statutory problems that have become so apparent, in a common sense approach that does not unnecessarily burden those regulated, yet provides safety for American families.



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE PETITION FOR TEMPORARY FINAL RULE
TO EXCLUDE A CLASS OF MATERIALS UNDER SECTION 101(b) OF
THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008 (CPSIA)

April 16, 2009

I am aware of the speculation that has surrounded my vote on this issue. My staff has spent the time since the ballot came to the Commission working on what I believe is a good solution for the riders of youth motorized recreational vehicles, building and expanding upon the initial position taken by Acting Chairman Nord. The direction my colleague and I are giving to the staff today balances the Congressional desire to protect children from unnecessary contact with leaded components in these vehicles with the need to protect those same children from the potential for physical injury related to riding inappropriate adult-sized vehicles, or riding vehicles either in need of repair or less structurally sound than the ones currently on the market.

It is clear from the post-enactment statements of some Members of Congress who were Conferees on the CPSIA that they believe the Commission has the authority to make sensible allowances for these vehicles as long as child safety is not compromised. Given the extremely restrictive language of the law, the only avenue I can see is for the Commission to establish an enforcement plan that follows, to the greatest extent possible, the Act's intention for future production, while providing relief to the industry and the riding community for vehicles already manufactured and those manufactured during the stay. There are compelling safety arguments that justify a stay of enforcement.

It is ironic that I am defending vehicles that I consider to be dangerous for children under 12 to ride and which contain accessible parts with excess levels of lead. However, the alternatives appear to be more dangerous. American parents seem to be willing to accept the risk for their children riding these vehicles, so it is the agency's task, at this stage, to ensure that the vehicles are as safe as possible. One safety rule the agency has stressed is keeping children off of adult-sized ATVs.¹ To the extent that new children's ATVs cannot currently meet the lead limits in the CPSIA, there is the likelihood that parents seeking new vehicles will buy adult-sized ATVs for their children to use. We have also been notified by one ATV manufacturer that they are simply relabeling their Y-6+ and Y-10+ youth ATVs as Y-12+, removing the speed limiting device and continuing to sell them. Thus the vehicles that are more accurately sized for younger children will be less safe because of their ability to attain higher speeds.

¹ Most of my discussion is focused on the ATV industry as they present the greatest (lead and non-lead) safety challenges. However, the enforcement program will also apply to children's off-road motorcycles and snowmobiles.

The other part of the safety equation that helps balance an enforcement plan against the increased lead exposure it allows, is based on the assertions that certain vehicle components cannot be made with lead below a certain level without compromising the structural integrity (or another safety element) of the component. The enforcement plan of the Commission must require concrete data from the manufacturers on this point to justify their continued use of lead in excess of the applicable lead limit.

The industry has pointed to the European Union's RoHS and ELV Directives as a guide for what lead reductions or substitutions may be technologically infeasible for their youth vehicles. While we might not need to allow the high lead limits allowed in those Directives for all components, there is guidance to be taken in how the European system is administered. They set an expiration date for their exemptions. Prior to that expiration date it is up to industry to come in and make their case that it is still technologically infeasible to reduce lead to a level at which an exemption is no longer required. The evidence considered is strictly limited to technological feasibility, not on the higher cost of a viable substitute. The guiding principle for this agency's determinations has to be the safety of the children riding these vehicles.

I believe a stay of enforcement issued by the Commission should:

- relieve all makers, sellers, and distributors of youth motorized recreational vehicles made to date and through the expiration date of the stay from enforcement actions for failure to meet the lead limits of the CPSIA;

- allow those vehicles to be repaired, sold, traded, and otherwise used as they have been;

- allow the sale, distribution and installation of replacement parts that are comparable in lead levels to the old part being replaced until such time as those parts can be brought into compliance;

- expect industry to bring their vehicle components into compliance on a reasonable schedule, to the extent that is technologically feasible, and to provide us with the detailed information we need to make informed decisions about those components in the future.

The Commission simply cannot ignore the safety tradeoffs that could arise by not providing this relief but it must also work with industry to bring the non-complying components of these youth vehicles as close to the lead limits established by law as is currently technologically feasible, to the extent those parts cannot be made inaccessible. The Commission also needs to let the riding community know that they can continue to use the vehicles they own as they always have.

I believe the approach taken today by myself and Acting Chairman Nord of directing the staff to draft a Federal Register notice containing concrete elements of a stay is the reasonable approach that the Congress is looking for us to take. I anticipate that the Commission will vote to approve it in the near future.

**DIRECTION TO THE STAFF ON THE REQUEST FROM ATV COMPANIES
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